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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

YORK WALLCOVERINGS, INC.,

Plaintiff,

v.

S.A. MAXWELL COMPANY, INC.
and JAIMA BROWN,

Defendants.

NO. 1:CV-01-0793

(The Hon. Sylvia H. Rambo) ✓

FILED
HARRISBURG, PA

JUN 28 2002

MARY E. D'ANDREA, CLERK
Per MED
Deputy Clerk

DEFENDANTS' MOTION PURSUANT TO F.R.CIV.P. §12 (b)(6) TO DISMISS
PLAINTIFF'S CLAIMS FOR STATUTORY DAMAGES AND ATTORNEY FEES

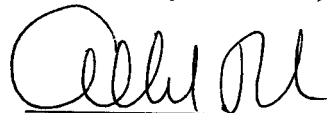
1. Defendants, S.A. Maxwell Company, Inc. and Jaima Brown ("Defendants"), hereby move pursuant to F. R. Civ. P. § 12 (b)(6) to Dismiss Plaintiff's Claims for Statutory Damages and Attorney Fees.
2. In its Complaint, Plaintiff demanded the right to elect statutory damages under Section 504(c) of the Copyright Act, 17 U.S.C. §504(c), which affords a copyright infringement plaintiff the right to elect statutory damages in lieu of actual damages, and attorneys' fees as provided by Section 505 of the Copyright Act, 17 U.S.C. §505.
3. As more fully set forth in the attached Brief, Section 412 of the Copyright Act bars Plaintiff from electing to recover statutory damages or from recovering attorney's fees where, as here, Plaintiff did not apply for registration within three months of first publication and Defendants' alleged infringement commenced after first publication of Plaintiff's designs and before the effective date of Plaintiff's copyright registrations.

4. Moreover, Plaintiff not only pleaded a claim for the right to elect statutory damages in its complaint but also continued to assert its entitlement to statutory damages in its motion to dismiss Defendant Brown's counterclaim, stating that "until further Order of the Court, statutory damages are at issue in this case. Since Plaintiff could not then have had a good faith basis to assert such a claim and since Plaintiff's position required Defendant to bring the instant motion, Defendants should be awarded reasonable attorney's fees incurred in responding to the portion of Plaintiff's Motion to Dismiss based upon statutory damages and in making this motion.

WHEREFORE, Defendants respectfully request that this Honorable Court grant their motion and dismiss Plaintiff's claim for statutory damages and attorney's fees.

Dated: New York, New York
June 27, 2002

Respectfully submitted,



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